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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 549

JOHN J. MUTH,
Petitioner-Appellant below,

vs.

AETNA OIL CO., JOHNSTON DRILLING CO., INC., FRED J. KECK, IDA F. KECK, ARTHUR OETH, ROBERT OETH, JAMES A. BOLAND, OLLIE HUSK,
Respondents-Appellees below.

PETITION FOR WRIT OF CERTIORARI.

JOHN J. MUTH,
Petitioner,
By WILLIAM C. WELBORN,
ALBERT WARD,
MILFORD M. MILLER,
PALMER K. WARD,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioner, John J. Muth, hereinafter designated as plaintiff, respectfully prays that a writ of certiorari issue to review and reverse the decision and judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on December 6, 1951, and represents as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. On August 7, 1950, the United States District Court for the Southern District of Indiana, Evansville Division, rendered a judgment against the plaintiff in an action wherein he sought relief against the defendants because of their wrongful conduct in depriving him of his rights in an oil and gas lease which he and the defendants, Arthur Oeth and Robert Oeth, had obtained from the defendants, Fred J. Keck and Ida F. Keck, as landlords, on December 22, 1947, and in which lease the plaintiff, at the time of its execution, and with the knowledge of said landlords, acquired a one-half partnership interest, and Oeths acquired the other one-half.

2. On October 6, 1947, the defendants, Arthur Oeth and Robert Oeth, then operating a business under the unincorporated firm name of The Oeth Drilling Company, as parties of the first part, entered into a written partnership agreement with the plaintiff, John J. Muth, as party of the second part, wherein it was recited that the first parties were then the owners of a Type, or Model No. 71 Star Drilling Machine, and various drilling tools and equipment which were itemized in a list attached to and made a part of said partnership agreement, valued at $4,000, and the first parties agreed to sell to second party a half-interest therein at that rate upon condition designated in the partnership agreement.

Oeths agreed to help secure Oil and Gas Leases or Royalties and help run the drilling rig. It was agreed that "If either party does not wish to sell *their* interest in Leases or property at a price that is offered and the other party does wish to sell, the party who does not wish to sell, agrees to either sell at the price offered or, to buy

the other parties' interest at the price they are offered". (R. 440.)

It was agreed that the partnership should begin as of October 6, 1947, and efforts should be made to secure desirable oil and gas leases and drilling deals in areas that were considered likely for oil or gas production, and an effort made to get the drilling rig running as soon as practical and to try to keep it running at a profit. (Plaintiff's Exhibit B-2, R. 439, 440, 441; offered, 151, admitted, 310, 354; Finding 6, R. 463.)

3. On December 22, 1947, the partnership obtained from the defendants Fred J. Keck and Ida F. Keck, an oil and gas lease covering 67.5 acres of land owned by them in Vanderburgh County, Indiana (sometimes referred to as the joint lease), and such lease is the basis of plaintiff's cause of action (Finding 4, R. 492); it was recorded on February 6, 1948, in the proper records of Vanderburgh County, Indiana (Finding 4, R. 492), and is Exhibit 1 attached to plaintiff's amended complaint (R. 29-35); as copy of such lease was set out in the master's report (Finding 4, R. 462, 492), but it was copied only once in the Record, pages 29-35.

4. At the time of the execution of said joint lease of December 22, 1947, it was known to Kecks, the lessors, that the lessees were partners in the business of taking oil and gas leases (Finding 6, R. 463), and the lessees were designated in said lease as "Arthur Oeth and Robert Oeth (owners of one-half interest) and John J. Muth, Sr. (one-half interest)", as required by the partnership agreement. (Partnership lease, December 22, 1947, R. 29; Partnership agreement, R. 439.)

The joint lease granted, demised, leased and let exclusively unto the said lessees, their successors and assigns, the land therein described for the purpose of operating

for and producing therefrom oil and gas; Keck's 67.5 acres were therein legally described. (Partnership lease, R. 30.)

The consideration for the lease was one dollar, with a provision that if no well be commenced on the land on or before one year from its date, the lease should terminate unless the lessees paid to the lessor $67.50, which would operate as a rental and cover the privilege of deferring the commencement of a well for twelve months from said date (Lease, R. 30, 31); by similar payments at the end of each twelve month period thereafter, the lease could be kept in force for three years. (Lease, R. 30.) The lessees agreed to deliver to the credit of the lessor, free of cost, the equal one-eighth part of all oil produced and saved from said leased premises, or at the lessee's option, pay to the lessor for such one-eighth royalty, the market price for oil of like grade.

It was agreed that if the lessee should commence to drill a well within the terms of the lease *or any extension thereof*, the lessee should have the right to drill such well to completion with reasonable diligence and dispatch. (Partnership lease, R. 32.) Lessor warranted and agreed to defend the title to the lands described. (Partnership lease, R. 34.) The lease contained the following provision: "This Lease shall terminate in three months and be null and void as to both parties unless the Lessees or their assigns shall commence or cause to be commenced the drilling of a test well and thereafter continue with due diligence to completion". (Partnership lease, R. 35.)

5. The partnership bargained for a Jensen drilling rig of capacity to drill twenty-five hundred to twenty-six hundred feet, in addition to the Star drilling rig of less capacity which was owned by the partnership; said Jensen rig was taken over by defendant Arthur Oeth and not used

as contemplated in the said partnership agreement. (Finding 7, R. 463.)

6. On January 3, 1948, Arthur Oeth gave a notice in writing to plaintiff Muth of his intention to terminate their partnership on thirty (30) days' notice, which he had the right to do and which was agreeable to Muth, but final settlement of partnership affairs was not had until July, 1948. (Finding 8, R. 463.) The joint lease from Keck of December 22, 1947, remained a partnership asset acquired during the existence of the partnership. (Conclusion 4, R. 474.)

7. About February 22, 1948, Muth requested defendant Arthur Oeth to move the Star rig onto Keck's property and commence drilling a well; Oeth refused to move any rig which they owned onto the Keck farm for the purpose of drilling (Arthur Oeth, R. 418); Arthur Oeth declined to attempt the drilling of the Keck well with said Star rig and so informed plaintiff in the latter part of February, 1948. Neither plaintiff nor Oeths had the money themselves with which to start the drilling of a well. The Star drilling rig was not of sufficient capacity to drill a well to the anticipated depth required (Finding 11, R. 464), but it had been used by the partners to drill a well of more than 600 feet and one of over 900 feet. (Arthur Oeth, R. 115.) The Court found that defendants Oeth neither hindered nor helped plaintiff toward drilling under the Keck lease of December 22, 1947. (Finding 26, R. 473.)

8. On March 1, 1948, Muth wrote Arthur Oeth that "The time for the commencing of a well on the Keck lease is getting short and I would like it if you and Robert would meet with me the earliest possible date and see if we can work out a peaceful and satisfactory dissolution agreement of our jointly owned business." (Finding 8, R. 463.)

9. Arthur Oeth made no answer to this request of plain-

tiff to meet with him, but within a few days thereafter, or about March 10th, without the knowledge of Muth, Arthur Oeth went to the home of the defendant, Fred J. Keck, who was his uncle, and obtained from said Fred J. Keck and Ida F. Keck, his wife, a "top lease" for gas and oil *to Arthur Oeth, alone,* on the same 67.5 acres of Keck's land which were covered by the lease from Kecks to said partnership of December 22, 1947; this top lease was dated back by Kecks and Oeth to December 22, 1947, was signed and delivered by Kecks to Arthur Oeth, individually (Arthur Oeth, R. 149), and was found by the Court to be "an exact copy of the lease of December 22, 1947, with the exception that the time (for drilling of a test well) was extended thirty or sixty days." (Finding 12, R. 465.)

Keck gave Arthur Oeth either sixty or ninety days to drill the first well and that time wasn't up on March 22nd, 1948. (Keck, R. 102.) He gave Oeth to some time past March in which to drill. (Keck, R. 399.)

10. The execution of such top lease was part of a conspiracy between Keck and Arthur Oeth (1) to deceive three of Keck's neighbors owning land adjoining Kecks on the south, and by artifice and trickery induce such neighbors to execute leases on their land to Arthur Oeth in his name (Oeth, R. 148, 149; Keck, 400), (2) enrich Keck by paying him $67.50 rental on his land as soon as one of said neighbors (Miss Mesker) had signed a lease with Oeth (Keck, R. 389, 406), and (3) with intent to defraud Muth by compelling him to pay his part of the $67.50 rental to Keck, if he desired to participate in the fraudulent scheme. (Finding 12, R. 12, 465.)

11. The Court found that Oeth and Keck had agreed when the top lease was executed that it was to be of no effect unless a lease was then obtained on the Mesker lands, a neighbor of Kecks owning land adjoining him on the

south, and the sum of $1.00 per acre paid to Fred J. Keck; that if such Mesker lease were obtained and the agreed consideration paid, the plaintiff was to participate in said top lease if he returned and desired to participate. (Finding 12, R. 465.)

12. When the top lease was executed, Oeth told Keck he wanted to get leases for himself on the three farms adjoining Keck on the south (Keck, R. 400, 401); Miss Mesker wouldn't sign a lease to Oeth with Muth's name on it, and neither she nor neighbor Klucker would sign a lease for Oeth unless they saw Keck's lease. (Arthur Oeth, R. 118.) Klucker wouldn't sign unless he also saw Miss Mesker's lease. (Oeth, R. 118, 126.) Miss Mesker had no confidence in oil men. (Arthur Oeth, R. 118.) She knew that Keck had given a lease, and she suspicioned that Muth's name was in it; to successfully deceive her, Keck and Oeth agreed to execute the top lease in Oeth's name alone, and date it back to December 22, 1947, so Oeth could show it to her and convince her that Muth had no interest in the Keck lease, and induce her to give Oeth a lease to him in his name alone (Arthur Oeth, R. 118, 148, 149), and he could then get Klucker's lease in his name. (Oeth, R. 118, 147.)

13. Keck knew when he signed the top lease for Arthur Oeth that he was going to show it to said neighbors of Keck and he authorized Oeth to show it to his neighbors so Oeth could deceive them and get their leases in his own name, and so Keck could get his $67.50, which he was to have as soon as Oeth got Miss Mesker's lease. (Fred J. Keck, R. 389, 400, 401.)

14. Arthur Oeth took his top lease and talked to Miss Mesker about getting her lease; he showed her such top lease and said, "I told her this is a lease on Keck, and then I asked her to sign; she wanted a lease like Keck and I gave it to her" (Arthur Oeth, R. 126); she consented to

sign a similar lease with Oeth (Arthur Oeth, R. 127) and arranged to meet him at her lawyer's office for that purpose at eleven o'clock the next day. (Arthur Oeth, R. 119.) He did not tell her that the top lease had been given to him for the purpose of enabling him to get a lease from her and Klucker, "but that was true." (Arthur Oeth, R. 120.)

15. Arthur Oeth met Miss Mesker at her lawyer's office the next day, but her lawyer wouldn't have anything to do with the lease which Oeth wanted her to sign (Oeth, R. 119), and Oeth was unable to obtain a lease from her that was satisfactory to him. (Finding 13, R. 465.)

16. When Arthur Oeth failed to get leases from Keck's neighbors, he still held his top lease until the morning of March 23, 1948, when he tore it up. (Arthur Oeth, R. 147.) Between the 10th and 15th of March Oeth talked with Keck and Keck told him he should go and see defendant Ollie Husk, as Husk wanted to drill a well on Keck's farm and he was trying to get a lease for that purpose. (Oeth, R. 131, 132.) Oeth also saw defendant Ollie Husk occasionally during that time and talked with him about drilling a well on Keck's land. (Oeth, R. 132.) Husk knew of the partnership lease of Muth and Oeth from Keck and he had gone to the record to see it right after he had seen Keck about getting the lease for the Johnston Drilling Co.; Keck had promised Husk he would give him the lease after the Muth-Oeth lease had expired. (Husk, R. 262.)

17. The Court found that in the meantime, Muth had talked with two men at Mt. Vernon, Indiana, and one at Mt. Carmel, Illinois, about purchasing his interest in the Keck lease of December 22, 1947, and the defendant, Arthur Oeth, told them he had a top lease on the Keck property. This was all prior to March 22, 1948. (Finding 15, R. 466.) This finding was based upon the uncontradicted evidence of Joel Vale and Edward Turner that in the

early part of March, 1948, Mr. Muth had talked to them about doing some drilling under the Keck lease to Muth and Oeth, and Mr. Muth wanted to sell his interest in such lease to them; they went and talked to Arthur Oeth in regard to whether they should buy it, and he told them they shouldn't buy it; it would just be a short time and it would be out, and he told them he and his son had a top lease over, a top lease on them (R. 153); when they told Oeth that Muth wanted to sell out completely, Mr. Oeth discouraged them from buying, and said the lease would be out in a short time, "that they had an override on this and it would be theirs in about a week." (R. 154.) Mr. Muth told Vale and Turner that he and Oeth couldn't get along, they had a falling out, and if they couldn't buy Mr. Oeth, he, Muth, wanted to sell to them; he wanted to sell his part if Mr. Oeth wouldn't sell; they asked Oeth about purchasing an interest and Arthur Oeth said "That the lease which Muth had taken on the Keck farm would expire in a short time, and he had a top lease." (R. 162, 163.) At that time Vale and Turner were financially able and willing to drill on the Keck land if they could have made arrangements with Muth and Oeth. (R. 164.)

Muth had made some arrangements for the financing of the Keck well, but they did not materialize after it was found out that Oeth was not going along with Muth and would probably cause him trouble with the lease. (Muth, R. 317.)

18. On the evening of March 22, 1948, Muth's drilling contractor, Boland, moved a Keystone No. 5¼ drilling rig to the premises of Keck and into his barn lot, a distance of some 700 feet from the location on the Keck farm referred to as "No. 1 Relocation", and left it there until the morning of March 23, 1948. (Finding 18, R. 467.)

The ground was soft because of heavy rains, and when

the plaintiff and Boland arrived at the Keck farm on the morning of March 23, they found the drilling rig had settled on one side and required jacking up and extricating before being moved to the No. 1 Relocation. During the progress of this work, defendants Arthur Oeth and Robert Oeth came to the Keck home, and soon thereafter defendant, Ollie Husk, arrived, and the defendants Arthur Oeth, Robert Oeth, Ollie Husk and Keck were all there together; they saw Muth and Boland working with the drilling rig, but there was no discussion with them at that time about their not having drilled or not being able to get their drill to the drilling site (Keck, R. 393); there was a conversation between Keck and Husk about stopping Muth and Boland from moving their drilling rig any further on the Keck property, and Husk told Keck he could stop them by having a legal notice served on them (Keck, R. 394), and Keck replied "That would be a good way to get myself into a lawsuit" and Husk said he didn't think so, "We will be back of you" (Keck, R. 396); thereupon Oeths, Keck and Husk left the Keck farm in Husk's automobile and went to Evansville to the law office of Joe Vol Butt (Finding 19, R. 467); at that time Arthur Oeth said Muth's time was up, but said nothing about his own lease (Keck, R. 103); the top lease wasn't at the lawyer's office (Keck, R. 103); Husk was claiming that Muth and Oeth had not validated their lease by starting to drill, and he took Keck to the attorney to get Muth and Boland stopped so he could put himself in a position to get the lease. (Husk, R. 264, 265.) The attorney prepared for them a written notice dated March 23, 1948, directed to James A. Boland and John J. Muth, Sr., advising them that they were then trespassing without right upon the Keck property, demanded that they leave such property, and notified them that they would be held responsible for damages for all their acts in trespassing or in continuing to trespass on

the Keck land (Plaintiff's Exhibit K, R. 448; offered and admitted, R. 188); the notice was signed by Keck and on the afternoon of March 23, the defendants Oeths and Husk returned with Keck to the Keck farm whereupon Keck gave one copy of such notice to Boland and read the notice and gave a copy thereof to Muth; Muth and Boland then quit and left the Keck property. At that time, in response to a remark of Boland concerning possible damages incurred by Keck in taking such stringent action, defendant Keck replied that it would not cost him one red cent; that he had been assured he would be taken care of in the defense of any law suit and in the payment of any damages. Before Keck served said written notice, the defendant Arthur Oeth and the defendant Husk advised the defendant Keck that they would defend any law suit that might be instituted against him by reason of any prior leases for oil and gas on said premises, with particular reference to the lease of December 22, 1947, to plaintiff Muth and the defendants Arthur Oeth and Robert Oeth, and agreed to indemnify said lessor against all costs and damages accruing from his act in declaring the plaintiff a trespasser on the premises and ordering him to leave. (Finding 19, R. 467, 468, 469.) Said indemnity agreement also included Arthur Oeth's top lease. (Keck, R. 402.)

Without this indemnity agreement of Arthur Oeth and The Johnston Drilling Company, Inc., the notice to quit the premises would not have been given by Keck on March 23rd and he would not have executed the lease to The Johnston Drilling Company, Inc., of March 27, 1948. (Keck, R. 294, 308, 309, 396, 404, 405; Husk, R. 278.)

19. On the 27th day of March, 1948, the defendant Husk obtained from Kecks a written oil and gas lease for The Johnston Drilling Company, Inc., on the same 67.5 acres of Keck's land (Finding 21, R. 470; Husk, R. 276, 277;

lease, R. 36-41, identified as Plaintiff's Exhibit S, offered and admitted, R. 354, 355); concurrently therewith (Keck, R. 295) the oral agreement of indemnity of March 23, 1948, of Husk and Oeth to Kecks was reduced to writing and signed by Husk as agent of The Johnston Drilling Company, Inc., and by Arthur Oeth, and delivered to Kecks. (Indemnity agreement, Plaintiff's Exhibit X, R. 457; offered and admitted, R. 307.)

The Johnston lease was for only one year, and it could not be prolonged for three years by the payment of an annual rental of $67.50. (R. 37.)

20. About a week before March 22, 1948, Keck told Muth he had given Arthur Oeth a top lease on his land; he thought it was a good lease; he did not tell Muth that the time for drilling a test well had been extended thirty or sixty days by such top lease, nor that he had given Arthur Oeth sixty or ninety days to drill a test well and that time wasn't up on March 22, 1948, and Muth had no knowledge of such extension of time. (Keck, R. 98, 99, 390.) Muth went to Keck and tried to get a copy of the top lease, but Oeth didn't leave him any lease nor any copy. (Muth, R. 316.)

21. On the 20th or 21st day of March, 1948, plaintiff's drilling contractor, defendant James A. Boland, employed a certified engineer to have a survey made of the Keck premises and to certify the survey showing the location of the test well and other data and furnish plats thereof and data for a drilling permit and to furnish bond as the law required. The surveyor was on the Keck farm on March 22 and surveyed and staked off two locations. (Keck, R. 391.) Said drilling contractor (Boland) hauled timbers for leveling the drilling rig and bricks for boiler and other equipment for commencing the drilling of a test well on the Keck farm. (Boland, R. 86.)

22. On June 2, 1948, defendant Aetna Oil Company took an assignment of a one-half interest in said lease of The Johnston Drilling Co., Inc., subject to an overriding royalty of one-sixteenth of seven-eights interest to an unnamed party, later disclosed to be defendant Husk. (Finding 22, R. 471.) At that time plaintiff and Boland had an action pending in the Vanderburgh Probate Court against Kecks, Oeths, and The Johnston Drilling Company, Inc., charging that The Johnston Drilling Company lease of March 27, 1948, had been fraudulently executed in wrongful conspiracy with Keck, and with intent of destroying the right and title of plaintiff in his lease of December 22, 1947, with Kecks. (Findings 20, 21, R. 469, 470.)

23. Prior to the execution of the assignment by The Johnston Drilling Co., Inc., to the Aetna Oil Company, Attorney Joe V. Butt was employed by the defendant, the Aetna Oil Company, to examine and pass on the title to said leasehold for the said Aetna Oil Company. He had appeared for Kecks and Husk in said Probate Court action and knew of the pendency of such action on and prior to June 2, 1948. (Finding 20, R. 470.) Said attorney was employed by The Johnston Drilling Co., Inc., on March 27, 1948, to pass on the title to said leasehold interest for it. By reason of having represented all of the defendants to the present suit (except Boland) in some capacity in connection with the matter of the lease for gas and oil on the 67.5 acres of defendant, Keck, said attorney for the various parties was fully aware and apprised of all the matters and things connected with said title and said litigation and the knowledge of such attorney is imputed to the defendants, The Johnston Drilling Co., Inc., and Aetna Oil Company, and was the knowledge of said companies at the time they acquired their respective interest in the premises. (Finding 24, R. 472.)

24. The first two wells which were drilled on the Keck land by The Johnston Drilling Co., Inc., under its lease of March 27, 1948, were drilled at the locations which had been selected by Muth's surveyor for him, and for which Muth had paid such surveyor $85.00, and such payment included the making of an application by such surveyor for the bond and permit. (R. 373-376; Plaintiff's Exhibit Z, R. 457; offered and admitted, R. 376, 377.)

25. To the first day of November, 1949, the wells on the Keck-Johnston lease had produced 45,406.57 barrels of oil and the total revenue derived therefrom was $125,776.18. (Plaintiff's Exhibit U, R. 454; offered and admitted, R. 253.) At the time this action was instituted the Keck lease of December 22, 1947, given to Oeths and Muth was worth a quarter of a million dollars; it would have sold for that. (Muth, R. 348.)

26. Plaintiff sued all of said defendants in ejectment and for possession of his leasehold interest in the Keck real estate, and for $2[illegible],000 damages (Complaint, R. 3-5); to remove a cloud from the title of plaintiff by cancelling the Johnston lease and adjudging plaintiff's lease of December 22, 1947, to be in full force and effect and that his rights therein be established and his title confirmed (Complaint, R. 5-11); for an accounting and the appointment of a receiver for all property and assets owned and controlled under claim of interest in the lease made with The Johnston Drilling Co., Inc. (Complaint, R. 12-14); to impress a trust on the oil and gas lease given to The Johnston Drilling Co., Inc. and the proceeds thereof and operation thereunder on the real estate of Kecks in Vanderburgh County, Indiana, and to declare said defendants to be trustees in so far as they are in possession of or claim any right or interest in and to said lease between Kecks and The Johnston Drilling Co., Inc. because of wrongful,

illegal and oppressive acts of collusion and conspiracy among the said defendants to wrongfully injure and damage plaintiff by destroying his rights in his partnership lease of December 22, 1947; that all defendants be enjoined from asserting the validity of said Johnston lease, and enjoined from interfering with plaintiff's rights in his partnership lease with Kecks. (Complaint, R. 20-29.)

James A. Boland was made a party as claiming in interest adverse to plaintiff in the leasehold sued on and joined as a defendant to answer as his interest may appear. (R. 5.)

27. The cause was referred to a special master (R. 92), who, after hearing the evidence, made findings of fact and conclusions of law against the plaintiff on March 2, 1950 (R. 460-476); on March 11, 1950, plaintiff filed written objections to the findings and most of the conclusions (R. 476-491); on July 17, 1950, the findings and conclusions of the master, in the main, were approved by the trial court (R. 492, 493); on July 26, 1950, plaintiff filed a written motion for judgment in his favor (R. 494-499), which motion the Court ordered stricken from the files on the written motion of defendants on August 7, 1950 (R. 500, 501); judgment was rendered against the plaintiff on August 7, 1950 (R. 501) and he appealed to the United States Court of Appeals for the Seventh Circuit on September 2, 1950 (R. 501, 502); the Court of Appeals affirmed on May 8, 1951. (Court of Appeals opinion, R. 519-529; its judgment, 530). No petition for a rehearing was filed.

28. On June 26, 1951, plaintiff filed his petition for a writ of certiorari with the Supreme Court of the United States praying that said Court review and reverse the decision and judgment of the Court of Appeals of May 8, 1951 (Cause No. 147, October Term, 1951, Supreme Court); on October 15, 1951, the Supreme Court entered

the following order: "*Per Curiam*: The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that Court for the purpose of determining whether there was jurisdiction by virtue of diversity of citizenship. Mr. Justice Black dissents". 70 S. Ct. 73 (4).

29. The mandate of the Supreme Court was issued to and filed with the Court of Appeals for the Seventh Circuit on November 26, 1951 (R. 538); on December 6, 1951, the Court of Appeals decided that there was jurisdiction by virtue of diversity of citizenship, and reaffirmed its previous opinion of May 8, 1951, with the exception of a statement in its opinion of that date (relating to jurisdiction) which was held by it to be improvident, and on December 6, 1951, it again affirmed the judgment of the trial court and ordered that its judgment of May 8, 1951, vacated by the Supreme Court, should be and was reinstated (R. 542); the judgment of December 6, 1951, is on page 543. No petition for a rehearing was filed. On December 26, 1951, upon plaintiff's motion, the mandate of the Court of Appeals was stayed pursuant to its Rule 25. (R. 531).

30. Jurisdiction is founded on diversity of citizenship and amount in controversy; the master and the trial court found and concluded that there was diversity of citizenship, and the jurisdictional amount was involved, and that the Court had jurisdiction of the parties and of the subject-matter (Findings 1, 2, R. 461, 462; Conclusion of Law 1, R. 474; adopted by the Court, R. 492). The Court of Appeals decided that the record supports the jurisdictional findings, and that the Court had jurisdiction by virtue of diversity of citizenship. (R. 542.)

II.

OPINIONS BELOW.

There was no written opinion of the district court.

The opinion of the Court of Appeals for the Seventh Circuit of May 8, 1951, is reported in 188 F. 2d 844, and is in the Record on pages 519 to 530.

The petition for writ of certiorari was granted plaintiff by the Supreme Court on October 15, 1951. The order entered by the Supreme Court on October 15, 1951, is reported in 72 S. Ct. R. 73. (4). The opinion of the Court of Appeals of December 6, 1951, is not reported, but is in the Record on pages 540 to 542.

III.

BASIS OF THIS COURT'S JURISDICTION.

The judgment of the Court of Appeals was entered on December 6, 1951. (R. 543.) No petition for a rehearing was filed. On December 26, 1951, its mandate was stayed pursuant to its Rule 25. (R. 546.)

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254 (1).

This petition is presented in a civil case by the plaintiff who was and is a party thereto.

IV.

STATUTES INVOLVED.

The pertinent statutory provisions of Title 28 United States Code, Section 1254 (1) are:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Burns Indiana Revised Statutes, 1933 (1951 Repl.), Section 50-430:

> "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

Burns Indiana Revised Statutes, 1933 (1951 Repl.), Section 50-421:

> "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the * * * conduct, or liquidation of the partnership or from any use by him of its property."

Title 28, U. S. Code, Section 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

QUESTIONS PRESENTED.

Question 1.

Did lessor Keck violate the substantive rights of plaintiff Muth, as those rights were guaranteed him under the law of Indiana, by evicting Muth from Keck's premises on the 23rd of March, 1948, and preventing him from fully performing the partnership lease which Muth and Oeths held from Keck of December 22, 1947?

Question 2.

Is Conclusion of Law #2 of the District Court, as approved by the Court of Appeals, that the partnership between plaintiff Muth and defendant Arthur Oeth terminated 30 days after the notice of January 5th, 1948, of Oeth to Muth canceling the partnership agreement and that no joint venture existed after that date in conflict with the decisions of the Supreme Court of Indiana and the Indiana statutes governing the termination of partnership rights and relations in Indiana?

Question 3.

Is Conclusion of Law #5 of the District Court and the decision of the Court of Appeals approving the same holding that after the termination of the partnership (held to have been, 30 days after January 5, 1948) "neither was under a duty to the other to drill on the Keck property" in conflict with applicable decisions of the Supreme Court of the United States and of the State of Indiana as to the continuing duty of partners to conserve joint assets of partners and co-tenants?

Question 4.

Does a constructive trust in a leasehold for gas and oil and the proceeds derived from the operation thereof arise where the lessee has obtained possession of the premises and the execution of the lease itself, solely by joining with one co-tenant and partner in a prior joint lease on the same premises in an agreement to defend the lessor in any event against any claim made by prior lessees with especial reference to his own partner and their prior joint lease?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

I.

The decision of the court that,

> "The joint lease, by reason of the provision heretofore quoted, became void at midnight on March 22, 1948, unless the drilling of a test well was commenced by that time;"

and holding that

> "Plaintiff's case must rest on the premise that he was never legally divested of his interest in the Keck land, and this premise must be supported by one of two theories, (1) that plaintiff performed prior to midnight March 22, 1948, under the three-month provision of the joint lease, or (2) that by reason of the so-called 'top lease' given by Keck to Arthur Oeth early in March, 1948, the time for performance under the joint lease was extended to the same extent as that provided in the 'top lease' ";

omits the element of estoppel of lessor to enforce the time limit clause, and waiver thereof, and is in conflict with the following applicable decisions of the Supreme Court of Indiana governing oil and gas leases in said state.

New American Oil and Mining Co. v. *Troyer* (1906), 166 Ind. 402, 407.

LaFayette Gas Co. v. *Kelsay* (1905), 164 Ind. 563.

Consumers Gas Trust Company v. *Ink* (1904), 163 Ind. 174.

Consumers Gas Trust Company v. *Littler* (1904), 162 Ind. 320, 327.

Consumers Gas Trust Company v. *Worth* (1904), 163 Ind. 141, 149.

These decisions establish the duty of the lessor to deal in good faith with the lessee and deny the right to declare the lease terminated where lessor has in any manner hindered or obstructed the performance by lessee of the drilling covenant of the lease or "induced" non-performance by his own acts or conduct.

1. Defendant lessor Fred J. Keck wrongfully invoked the three-month drilling clause of the joint lease against the plaintiff, John J. Muth, because: He both induced non-performance by lessee Arthur Oeth and hindered and obstructed performance by plaintiff Muth.

(a) By performing the drilling covenant of the joint lease, lessee Arthur Oeth would secure a $\frac{1}{4}$ interest in $\frac{7}{8}$ of the gas and oil. By terms of the top lease executed by lessor Keck to Arthur Oeth alone, he was granted the entire $\frac{7}{8}$ working interest:

(b) By the terms of the joint lease, lessee Arthur Oeth had three months from December 22, 1947, in which to commence the drilling of a test well on the premises. By the execution of the top lease, lessor Keck granted to lessee Arthur Oeth six months from said December 22nd in which to begin the drilling of a test well on the premises.

2. Defendant lessor Keck hindered and obstructed the performance of the joint lease by plaintiff Muth, because:—

(a) He authorized the use by Arthur Oeth of the top lease to show other prospective investors that lessor Keck had granted Arthur Oeth his full leasehold.

(b) He granted the right to Arthur Oeth to claim title in himself alone and the top lease became and was the basis of an adverse claim, dissuading investors from development under the joint lease as hazardous and threatening legal entanglement.

3. The decision of the court that

> "In view of these findings, no logical basis is discernible in support of plaintiff's theory that there was any purpose on the part of Arthur Oeth or Keck, and particularly the latter, that the 'top lease' was for the purpose of doing any wrong or injury to Muth; in fact, it would seem that the lease was not worth more than the paper upon which it was written. Certainly it was not binding upon Keck and that it was not so intended is evidenced by the fact that it was destroyed by Oeth. More than that, the fact that Keck informed Muth that the lease had been given to Oeth, the purpose for which it had been given, and that it had no effect upon the latter's interest in the joint lease, indicates good and not bad faith on the part of Keck. And this information was given to Muth some twelve days before the expiration of the time for performance under the latter lease."

is in conflict with the law and applicable decisions in Indiana governing conveyances.

When he executed the top lease to Arthur Oeth, lessor Fred J. Keck believed it was a "good" lease. (R. 99). The top lease was not destroyed until after March 22, 1948. (Dep., Oeth R. 120.) Before he ejected plaintiff from the premises on March 23, 1948, he had the agreement of both Arthur Oeth and the prospective lessee, defendant Johnston Drilling Co., Inc., to protect him from any claims by reason of the top lease as well as the joint lease and this agreement was reduced to writing March 27, 1948 (Plaintiff's "Exhibit X," R. 457), before the defendant Keck would execute the lease to the Johnston Drilling Company, Inc. (R. 278, 294, 402).

Defendant Oeth executed this muniment of title to Arthur Oeth and enabled him to dissuade the prospective investors Joseph Vale and Edward Turner from investing with plaintiff in the joint lease. The decision of the court

refers to the purpose which both Keck and Oeth testified they had in the execution of the top lease.

This purpose was to prove to their neighbors that Arthur Oeth alone had valid and full claim to the Keck lease in his sole name, so that Arthur Oeth could obtain from them oil and gas leases in his own name. It is thus solemnly found on this record that the top lease was conceived in fraud and held out to third parties as valid to obtain valuable rights by the falsehood and the Court of Appeals holds both parties thereto acted in good faith and can take advantage of the fact it was a mere sham to defeat its effect on the plaintiff's rights in the premises. As a matter of equity such a result is written off by the scrap of paper doctrine and the reference to the finding of the Master that Arthur Oeth and Fred J. Keck did all this for the benefit of plaintiff Muth since had they shown the joint lease the neighbors would have declined to lease their lands because of Muth's disclosed interest.

This is in conflict with the rule of conveyancing in Indiana that whether a party executing a conveyance intends to vest the grantee therein with title or not, he is estopped to deny such intent where injury results to another thereby. *Preston* v. *Witherspoon* (1886), 109 Ind. 457, 464, 465, citing and quoting *Cowdrey* v. *Vandenburgh*, 101 U. S. 572.

4. The ultimate reason lessor Keck was estopped as a matter of law to declare the Muth lease void for non-performance of the three months drilling clause is that he worked openly with Arthur Oeth to invalidate the joint lease during the vital period Arthur Oeth withheld the drilling rigs he was bound to use under the partnership agreement to drill and validate the Keck lease. Either rig in Oeth's possession and held on his neighboring farm would have spudded in and commenced the test well and is found by the court of a capacity to have drilled the well

to its full depth (Finding 7, R. p. 463) (Finding —, p. 464). Sixty days after plaintiff Muth was ejected defendant Johnston Drilling Co., Inc., assigned ¼ interest in their lease to have the test well drilled. Other wells to be drilled out of production. There is no evidence whatsoever that Johnston Drilling Co., Inc. did more than validate their lease. The actual drilling was done by Aetna Oil Company for their ¼ of ⅝ interest in the same leasehold taken by lessor Keck with the assistance of lessee Arthur Oeth from plaintiff Muth. (Finding 23, R. 471.)

The decision is in conflict with the applicable decisions governing conditions subsequent in Indiana law as declared in *Elkhart Carworks Co.* v. *Ellis*, 113 Ind. 215; holding:

> "It would be a flagrant violation of a right to permit the grantor of an estate upon a condition subsequent to defeat the estate by wrongfully preventing the performance of the condition, and the law is not subject to the reproach of permitting such a thing to be done."

It is not only that Fred J. Keck, with the joint lease in full force and outstanding, deliberately executed a top lease to plaintiff's partner Arthur Oeth to the entire leasehold, but he rendered this act doubly dangerous by authorizing his lessee Arthur Oeth to represent to third parties that he held a valid lease on the entire premises and these third parties included prospective investors in the leasehold with Mr. Muth. They were the same parties who testified they stood ready to drill these wells with Mr. Muth for an interest in the premises. It was brought out on cross-examination that at the time of the trial these investors were drilling other wells with Mr. Muth and were willing to develop the Keck lease regardless of who held the adjoining leases. This was produced solely by the wrongful action first of lessor Keck in executing the top

lease and second by the wrongful use thereof by Arthur Oeth and by his refusal to bring the drilling rigs on the premises or to have anything to do with the development of the premises with Mr. Muth or his prospective investors. It is inconceivable that a lessor who has thus blocked the performance of a drilling covenant should be held to have the right to invoke that covenant at midnight of the 22nd of March or on the next day thereafter.

5. Neither the notice given by defendant Fred J. Keck to oust plaintiff John J. Muth from the leased premises and terminating the joint lease on March 23, 1948; nor the third lease to the Johnston Drilling Co., Inc., of March 27, 1948, would have been delivered unless defendant Arthur Oeth and Johnston Drilling Co. Inc., had first by parole on March 23 and later in writing on March 27 agreed with lessor Fred J. Keck that:

> "In the event any claim is made against you by any former lessee, we agree to defend such action and to protect you against whatever claims are asserted by former lessees." (R. 294, 308, 309, 396, 404, 405, 278.)

The contract is against public policy, illegal and void because, made by a partner, cotenant and copromisor of plaintiff Muth to deprive him of the partnership leasehold and give it to another and the lease of March 27, 1948, to Johnston Drilling Co., Inc., is invalid because obtained by said illegal agreement and the ousting of plaintiff was wrongful and for the same reason the notice to plaintiff to vacate was void and his ejectment was wrongful and oppressive and illegal.

The decision of the Court sustaining this contract and the possession and third lease obtained by it valid is in conflict with the following applicable decisions of other United States Courts of Appeal:

Horbach v. *Coyle,* C. C. A. (1924), 2 Fed. (2) 702, 706-707;

Trice v. *Comstock*, C. C. A. (1903), 121 Fed. (2) 620;

and is believed to be in conflict with the decision of the Supreme Court of the United States in *Buffum* v. *Barceloux Company* (.....), 289 U. S. 227, 237; 77 Law Ed. 1140.

6. It is error to place the claimed right of lessee Keck to oust plaintiff Muth from the premise on the ground he was allegedly an adventurer. The record shows his entire ability to drill oil wells in that he had drilled successfully in many states (R. 166, 167, 309) and was drilling with the same associates at the time of the trial (R. 353, 291, 421, 422, 427), who testified they were *"anxious"* (R. 154, 289, 290) to come in with him on the partnership lease (R. 154, 156), but were kept out by Arthur Oeth's claim to the entire leasehold. (R. 336, 348, 160, 164.)

7. The holding as against plaintiff Muth that in the third lease to Johnston Drilling Co., Inc. the lessor Keck "was dealing with a party capable of drilling as is evidenced by the fact that three wells were drilled shortly" is erroneous. The lessee Johnston Drilling Co., Inc. did not drill this lease. They did not even validate this lease within the sixty days they had in which to drill after Mr. Muth was ousted. Their lease was dated March 27, 1948. (R. 176.) They had a rig in the lease on the 26th of May (R. 179), but did not begin drilling until May 28 (R. 299), and did not get their permit to drill until the 2nd or 3rd of June (R. 299), and on the 2nd they assigned a ½ interest in their lease, that was taken from Mr. Muth, to Aetna Oil Company (Plaintiff's "Exhibit L" 448, 449), burdened with a 1/16 override to defendant Husk and even with the litigation pending in state court, Aetna Oil Company proceeded to drill one well at their own expense and two more from oil produced for their ½ interest. (Findings 22 and 23, R. 471, 472.) Johnston Drilling Co., Inc. hold their ½ interest

until now without doing as much as Mr. Muth did and using the very survey and location Mr. Muth paid for (R. 346) and he is declared on this opinion a mere adventurer and the very party who pirated his lease praised for using it to retain a ¼ interest and given full credit for what Aetna Oil Co. did—this lease was capital. If Johnston Drilling Co., Inc. had credit so did plaintiff Muth for they used precisely what they took from him excepting burdened in their hands with litigation plus an overriding royalty, one-half of which was assumed by Aetna Oil Company and they did just what Mr. Vale, Mr. Turner and Mr. Kemp were anxious to do for Mr. Muth before there was either litigation or the burden of an override.

II.

The Conclusion of Law #2 of the District Court as follows:

> "That the partnership agreement between the plaintiff and defendants, Oeth, terminated thirty (30) days after January 3, 1948. That neither a joint venture nor a mining partnership between them existed after the partnership terminated." (R. 474.)

and the decision of the Court of Appeals approving the same is in conflict with applicable decisions of the Supreme Court of Indiana as in *McKinley* v. *Long* (1949), 227 Ind. 639, 88 N. E. (2) 382 and also adopted by statute in Indiana providing that

1. "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

Burns Indiana Revised Statutes, 1933 (1951 Repl.), Section 50-430.

2. Each partner is a fiduciary in dealing with the partnership property and this also is statutory.

Burns Indiana Revised Statutes (1951 Repl.), Section 50-421.

3. Section 50-402 Burns Indiana Revised Statutes (1951 Repl.) provides

"'business includes every trade, occupation, or profession.'"

4. Surviving partners are held in the same fiduciary relation as administrators under Indiana law.

Surviving partner Act (1877).

Burns Indiana Revised Statutes (1951 Repl.), Section 50-302.

III.

The Conclusion of Law #5 of the District Court as follows:

"That after the termination of the partnership between plaintiff Muth and defendants Oeth, neither was under a duty to the other to drill on the Keck property. * * *"

and the decision of the Court of Appeals approving the same is believed to be:

1. In conflict with the decision of the Supreme Court of the United States in *Denver* v. *Roane* (1879), 99 U. S. 355, 358, 25 Law Ed. 476, holding that where partners had jointly undertaken the business entrusted to the partnership, all of the parties were under obligation to conduct it to the end as a duty owed to their client and to one another, and

2. In conflict with the decision of the Supreme Court of Indiana in *Stevens, et al.* v. *Reynolds* (1895), 143 Ind. 467, 477, holding the relation of co-tenant is one of trust

and confidence and neither can do any act to prejudice or injuriously affect their interest in the common property, and abrogates the Indiana rule holding co-tenants as trustees in dealing with the joint estate. *McPheeters* v. *Wright* (1890), 124 Ind. 560; *Ryason* v. *Dunten* (1904), 164 Ind. 85.

IV.

The decision of the court approving the agreement of plaintiff's partner Arthur Oeth and the Johnston Drilling Co., Inc. to defend any actions and protect lessor Keck from any claims made by lessees in prior leases is in conflict with applicable decisions of the Supreme Court of Indiana governing the duties of partners and co-tenants in dealing with the joint estate and in conflict with decisions in other United States Courts of Appeal governing contracts made by fiduciaries with third persons subverting trust property and is believed to be in conflict with applicable decisions of the Supreme Court of the United States governing the duties of fiduciaries in dealing with the trust property.

1. An error in the statement of the opinion that is factual should be noted. The opinion infers that the agreement in question followed the serving of the forfeiture notice on Muth and Boland stating that:

> "he * * * at the time of serving the forfeiture notice on Muth and Boland had been told by the latter that such action would mean a law suit and it was perfectly natural that Keck under the circumstances should be protected."

The facts as found show the agreement preceded the notice to Boland and Muth.

> "In the afternoon of said 23d day of March, the defendants, Oeth and Husk, returned with defendant Keck to the said Keck farm, whereupon said defend-

ant, Keck, gave one copy of said written notice to plaintiff's drilling contractor, James A. Boland, and read the notice and gave a copy thereof to the plaintiff, John J. Muth. At the time, in response to a remark of the said James A. Boland, concerning possible damages incurred by lessor in taking this stringent action, defendant Keck replied that it would not cost him one red cent; that he had been assured he would be taken care of in the defense of any law suit and in the payment of any damages. It later appeared that before defendant Keck served the said written notice, the defendant, Arthur Oeth, and the defendant Husk, advised the defendant, Keck, that they would defend any law suit that might be instituted against him by reason of any prior leases for oil and gas on said premises," (Finding #19, R. 468, 469).

2. There is another factual error in the opinion that should be noted in this connection. The opinion states:

> "The only advantage which accrued to him (Keck) was that in the latter lease he was dealing with a party capable of drilling as is evidenced by the fact that three wells were drilled shortly."

This latter lease of March 27, 1948, contains the following provisions (R. 40):

> "Notwithstanding anything to the contrary above contained, it is understood and agreed that unless lessee commences operation for the drilling of a well on the above land within 60 days from date hereof, this lease shall terminate and be of no further force and effect."

A drilling rig was moved on the premises on May 26. Actual drilling did not commence until May 28. The permit to drill is dated June 1 but was not received by the Johnston Drilling Co., Inc. until the 2nd or 3rd of June. (R. 299.) On June 2, 1948, one-half interest in this lease was assigned to the Johnston Drilling Co., Inc. (R. Plain-

tiff's "Exhibit L", 448, 449) burdened with a 1/16 of 7/8 overriding royalty of defendant Ollie Husk. The consideration for this assignment was that the Aetna Oil Co. would bear the expense of drilling the first well and thereafter the wells were to be drilled out of proceeds of the oil. (R. Finding 471.) It is conclusive on the record that the third lessee, Johnston Drilling Company, Inc. did not drill the wells.

3. It is overlooked on this record that without this illegal and immoral agreement of defendant Oeth who stood in a fiduciary relation with plaintiff, the notice to quit the premises would never have been given and that the third oil and gas lease to Johnston Drilling Co., Inc. was obtained solely by means of this agreement. Defendant Ollie Husk testified, "That was the only way I could get the lease * * * I couldn't have gotten that lease otherwise." The agreement is Plaintiff's "Exhibit X." (R. 457.) The agreement approved on this decision contains over the signature of plaintiff's partner and co-tenant these words:

> "It is understood by both of us that all prior leases have expired. However, in the event any claim is made by any former lessee, we agree to defend such action and to protect you against whatever claims are asserted by former lessees."

4. This is an agreement by a fiduciary as both partner and co-tenant joining with the party that is seeking to take over the joint estate in the oil and gas lease, that in any event, that whether or not the joint lease and the top lease of Arthur Oeth have expired, lessor Keck will be protected in ousting plaintiff from the premises.

5. The decision that this contract was harmless is in conflict with applicable decisions of the Supreme Court of the United States, as in the case of *United States* v.

Dunn (1924), 268 U. S. 121, 131, 132, 69 Law Ed. 120, holding that one who traffics with a recreant trustee can gain nothing because of the wrongs practiced upon the beneficiary and is likewise in conflict with applicable decisions of the Courts of Appeal as in the case of *Horbach* v. *Coyle*, 8 C. C. A. (1924), 2 F. (2d) 702, 706 holding that:

> "If a contract falls within a general class void as against public policy it matters not that it is free from any taint of fraud or corruption. The law regards the general tendency of such contracts,"

citing *McMullen* v. *Hoffman*, 174 U. S. 639, 19 S. Ct. 839, 43 L. Ed. 1117 (707):

> "Where a contract grows immediately out of and is connected with a prior illegal contract, the illegality of such prior contract will enter into the new and render it illegal. * * *"

6. The decision on this point is in conflict with an applicable decision of the Court of Appeals for the Eighth Circuit in the case of *Trice* v. *Comstock* (1903), 121 Fed. 620, 625, holding:

> "Nor is it any defense to the suit to enforce this trust that the agency had terminated before the confidence was violated. The duty of an attorney to be true to his client, or of an agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term."

this case further holds (626):

> "The truth is that the principle of law which controls the determination of this case is not limited or conditioned by the interests, powers, or injuries of the parties to the fiduciary relations."

and a decision by Lord Brougham is cited holding:

> "That it is the duty of the trustee 'to do nothing for

the impairing or destruction of the trust, nor to place himself in a position inconsistent with the interests of the trust.' "

7. The duty owed by Arthur Oeth on any date after the obtaining of the partnership lease of December 22, 1947, remains constant and that duty was to conserve the joint property and not destroy it. It is wholly immaterial whether he profited by his act; the wrong he committed was in depriving the partnership of its chief asset and in dealing with him as a co-tenant and recreant partner, the Johnston Drilling Co., Inc. took the leasehold charged with a constructive trust for the use and benefit of plaintiff Muth as partner, co-tenant and co-promissor in a joint contract. *United States* v. *Dunn* (1924), 268 U. S. 121, 131, 132, *Buffum* v. *Peter Barceloux Co.* (1932), 77 Law Ed. 1140, 289 U. S. 227, 237, holding that:

> "The implication of a trust is the implication of every duty proper to a trust. Equity has its distinctive standards of fidelity and honor, higher at times than the standards of the market place. *Meinhard* v. *Salmon*, 249 N. Y. 458, 468, 164 N. E. 545, 62 A. L. R. 1. Whoever is a fiduciary or in conscience chargeable as a fiduciary is expected to live up to them."

WHEREFORE, your petitioner prays that a writ of certiorari issue under the Seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals had in the case numbered and entitled on its docket, No. 10279, John J. Muth, Plaintiff-Appellant *vs.* Aetna Oil Company, Johnston Drilling Company, Inc., Fred J. Keck, Ida F. Keck, Robert Oeth, Arthur Oeth, James A. Boland and Ollie Husk, Defendants-Appellees, all to the end that this cause may be reviewed and determined by the Court as

provided for by the Statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Seventh Circuit be reversed by the Court and for such further relief as to this Court may seem proper.

Dated January 21, 1952.

JOHN J. MUTH,
Petitioner,

By: WILLIAM C. WELBORN,
ALBERT WARD,
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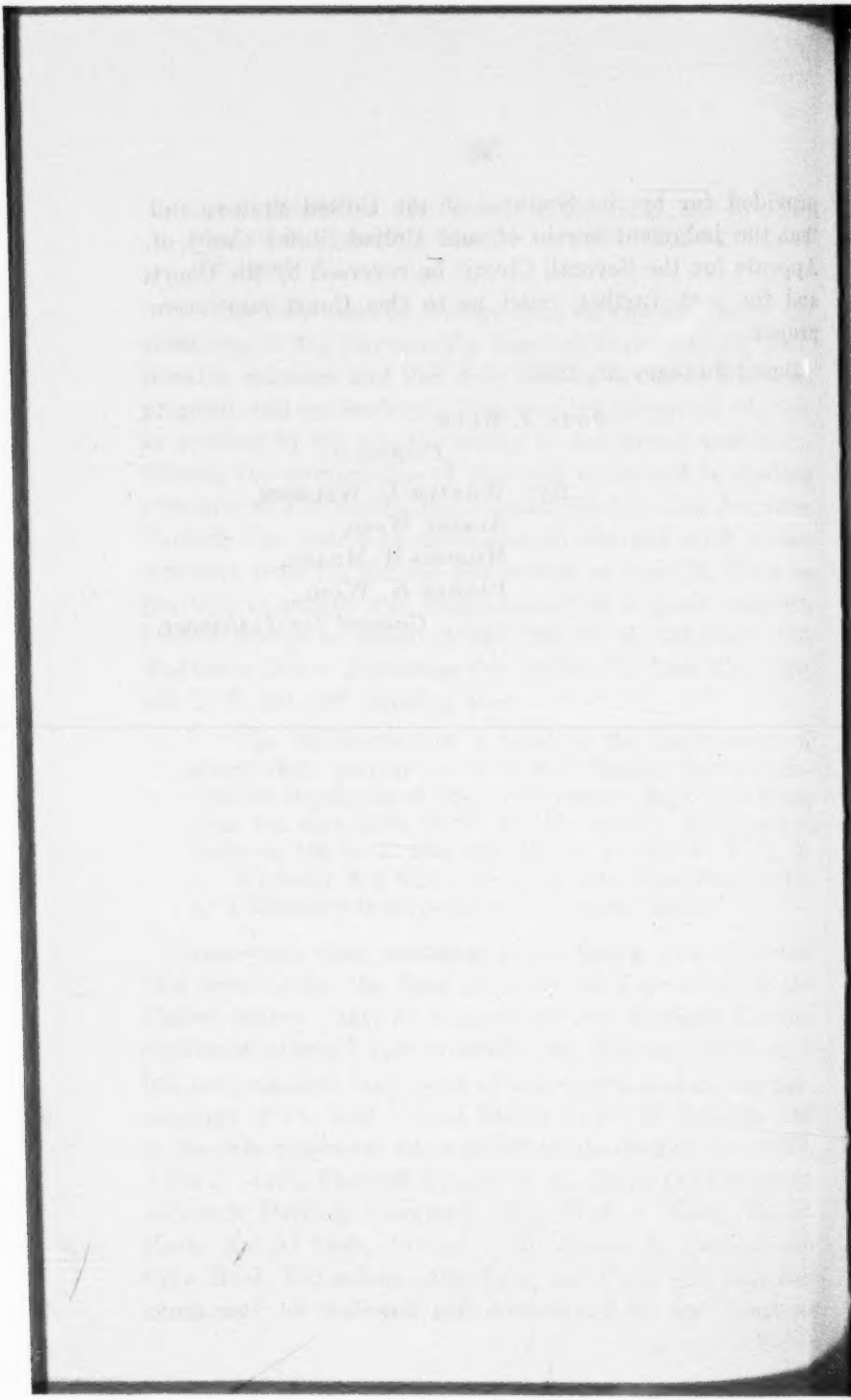

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 549

JOHN J. MUTH,
Petitioner-Appellant Below,
vs.

AETNA OIL CO., JOHNSTON DRILLING CO., INC., FRED J. KECK, IDA F. KECK, ARTHUR OETH, ROBERT OETH, JAMES A. BOLAND, OLLIE HUSK,
Respondents-Appellees Below.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Supreme Court of the United States:

For answer to Plaintiff's (petitioner's) Petition for Certiorari, the Respondents-Appellees respectfully submit the following:

I.

A STATEMENT OF THE CASE.

Respondents feel that Petitioner's Summary of the Matter Involved is neither fair nor correct. Doubtless through misguided zeal, the statement is little more than an argument based on those portions of evidence Plaintiff deems most favorable to him. Such statements that "the

execution of such top lease was part of a conspiracy—to deceive neighbors—to enrich Keck,—and with intent to defraud Muth" (Pet. for Cert., p. 6) are in direct conflict with the great weight of the evidence, and are contrary to the findings of fact and to the decision of the trial court. Certainly they are not any part of a fair summary.

The facts are adequately and fairly summarized in the decision of the Court of Appeals for the Seventh Circuit. (188 Fed. (2) 844.) We believe the following to be a fair resumé.

In October, 1947, plaintiff Muth and defendants Oeth entered into an agreement for the operation of a small drilling rig and for the acquisition of oil and gas leases. The agreement provided for termination by either party on 30 days' notice, and that any partner might engage in the same or any other business, but not at the expense of the partnership. (R. 439.) The agreement was not recorded. (R. 342.) Defendant Keck knew of the partnership. (R. 463.) None of the other defendants knew of the partnership, nor had any of them any dealings with it. (R. 341-342; Finding 25; R. 473.)

Pursuant to the agreement, on December 22, 1947, Muth and the Oeths obtained from defendants Keck an oil and gas lease on the 67.5 acres in controversy. The lease was made to the three individual partners as lessees and did not reveal the partnership relation. It provided for the customary $\frac{1}{8}$ royalty, and contained the special provision that "This lease shall terminate in three months and be null and void as to both parties unless the Lessees or their assigns shall commence or cause to be commenced the drilling of a test well and thereafter continue with due diligence to completion." (R. 462; Finding 4.)

On January 5, 1948, Arthur Oeth gave plaintiff notice in writing of intention to terminate the partnership, pursuant

to the 30-day provision. Muth replied that such was agreeable to him. (Finding 8, R. 463; Def. Ex. B-1, R. 459.)

In an attempt to prevent expiration of the joint lease by failure to drill by March 22, 1948, Arthur Oeth made efforts to obtain adjacent leases and induce others to drill on such lease block. Muth had the original Keck lease in his possession (Finding 9, R. 464), and about the end of February, 1948, Oeth requested Keck to sign an exhibit lease, substantially similar to the original lease, to exhibit to Keck's neighbors in an effort to induce them to execute leases on their tracts. Keck did so. The exhibit (so-called "top lease") was, as nearly as memory could recall, exactly the same as the original except that Oeth alone was named as lessee and the time to commence drilling was somewhat extended. Such "top lease" was not notarized nor recorded (Finding 12, R. 465.) Its sole purpose was to gain other leasehold acreage and thereby preserve the rights of Plaintiff Muth and of Defendants Oeth. (Finding 12, R. 465.) Neither Oeth nor Keck treated it as a valid lease, nor claimed that it superseded the original joint lease. It was destroyed by Arthur Oeth. (R. 465.) About March 10, 1948, Keck informed Muth of the exhibit or top lease and of its purpose, and advised that it was not intended to impinge upon the validity of the joint lease if performance was made thereunder. (Finding 14, R. 465.)

The partnership rig was not adequate to drill the required well on the Keck lands. (Finding 11, R. 464.) Neither Muth nor the Oeths was financially able to drill such well. (Finding 11, R. 464.)

Shortly before March 22, 1948, Muth entered into a contract with James A. Boland whereby Boland undertook to commence drilling a well on the Keck lands. (Finding 16, R. 466.) Muth did not make any application to the Department of Conservation for a permit to drill, nor post the requisite bond. (R. 467.) On the evening of March 22,

1948, Boland moved an old rig into Keck's barnlot, and left it there, some 700 feet from the proposed location. The rig lacked many essential items, was not equipped to drill, and no drilling was attempted. No drilling was done and no well was commenced by midnight, March 22, 1948, at the proposed location or elsewhere on the Keck lands. (R. 194-196, 210-11; Finding 29, R. 493.)

Prior to the expiration of the joint lease, Defendant Husk had told Keck that he (Husk) would be interested in acquiring a lease on the 67.5 acres if the joint lease expired for failure to drill. But he made no offer, nor any attempt, to acquire such lease until after March 22, 1948. On March 23, 1948, Keck, with Husk and Arthur Oeth in company, consulted an attorney, Mr. Butt, as to whether the joint lease had expired for failure to drill within the stipulated period of three months. Butt then prepared a notice, directed to Muth and Boland, to the effect that the joint lease had terminated. (R. 467-468.) Keck signed such notice, and later in the same day personally served such notice on Muth and on Boland. (Finding 19, R. 468.)

On March 27, 1948, the Kecks executed a new lease to Johnston Drilling Company. This lease was negotiated for Johnston by Husk. Prior to executing such new lease, Keck required a letter of indemnity against claims which might arise under the old lease. (Pltfs. Ex. X, R. 457.) This letter was signed by Arthur Oeth, and by Husk in behalf of Johnston. Mr. Butt prepared both the new lease and the indemnity letter. (R. 276-277.) Only the nominal consideration of $1.00 was paid for the new lease. It provided for the customary ⅛ royalty. (Finding 21; R. 470.)

Thereafter, Johnston assigned an overriding royalty interest to Husk, and ½ leasehold interest to Aetna Oil Com-

pany. Drilling was effected per the new lease, Aetna and Johnston having drilled three producing wells on the Keck lands. This litigation resulted.

OPINIONS BELOW.

The trial court entered judgment without written opinion. The original opinion of the Court of Appeals appears at 188 F. (2) 844. After this Court granted Certiorari (72 St. Ct. 73) and remanded the cause for the purpose of determining jurisdiction, the Court of Appeals modified its former opinion and reinstated judgment as modified. That opinion is now reported at 192 F. (2) 1014.

QUESTION PRESENTED.

We cannot agree with the argumentative questions as put by Petitioner. As Respondents see the matter, the only question presented is:

> Was Plaintiff's failure to perform under the lease of December 22, 1947, due to any wrongful act of these Defendants?

ANSWER TO PETITIONER'S ARGUMENT.

In very large measure, the reasons relied upon by Petitioner for allowance of the writ are exactly the same as those relied upon in his first petition for Certiorari (#147, October Term, 1951). Practically all of the authorities cited in his new petition have already been discussed or distinguished in Respondents' answer to the first petition. For the sake of brevity, we shall attempt to confine argument to the new matters raised. Strictly speaking, there are no such new matters, but only the same one re-phrased: An attempt to show conspiracy by these Respondents which prevented performance by Muth under the joint lease which expired on midnight of March 22, 1948.

Which of Defendants could have so conspired? Aetna and Johnston had no dealings with Muth, and did not enter the picture until March 27, 1948, or later. Husk had no dealings with Muth. He had talked to Mr. Keck and evinced an interest in acquiring a lease on this 67.5 acres if the joint lease expired (R. 262), but clearly stated (R. 279) that the joint lease would remain in effect "if they start drilling tonight before midnight" (*i. e.*, midnight of March 22, 1948); and thus showed that he would not try to obtain any lease unless and until the lease of December 22, 1947 expired.

Defendant Boland had an interest adverse to Aetna, Johnston and Husk. Boland's claim to an interest was derived through Plaintiff. If he conspired, it was not against Muth.

Next, what of Arthur and Robert Oeth? Arthur, the father of Robert and nephew of Mr. Keck, was the actor for the two. His actions between the time he gave notice

of termination of the partnership and the time the joint lease expired may not have been wise or well directed, but, at least, he tried to preserve the joint lease for himself and Muth by assembling a drilling block large enough to interest others in actual drilling. Muth contended himself with trying to sell, not to drill. The testimony is clear and uncontradicted that Oeth had no dealings with Husk, Johnston, or Aetna until after March 22, 1948. He and Husk met for the first time on the morning of the 23rd when they accompanied Keck in response to Keck's desire to consult an attorney as to the status of his rights. He (Oeth) got nothing from the new lease and was promised nothing. (R. 130.) His actions to preserve the joint lease may have been bumbling, but they were not culpable. At least, he tried. It seems to be Plaintiff's chief complaint that Oeth didn't try in the right fashion. If such a complaint is justified, Oeth can equally complain that Muth did not try very much at all, and even then in an inadequate fashion. If Oeth had prevented performance and gained thereby, Muth might well make Oeth a constructive trustee to the extent of the gain; but Oeth got nothing, and in any event, the other defendants claim nothing and got nothing through Oeth.

This leaves Mr. Keck. This good man, whose sincerity is apparent even from the printed page, now hears the Plaintiff call him the chief conspirator and the connecting link between two bands of thieves. True, if there were a conspiracy, Keck would have to be the connecting link, for of the other defendants only the Oeths dealt with him prior to March 22, 1948, and only Husk, Johnston and Aetna after that date. Keck, a man of 72 years (R. 406) was born on the land in question and had lived there all his life. (R. 94.) He gave Muth and Oeth a lease on December 22, 1947, for the nominal consideration of $1.00 (paid by Oeth) to help them get drilling block started.

His only requirement was that they "commence drilling" by March 22, 1948. Muth and Oeth were unable to obtain other nearby leases, but through no fault of Keck. Even the exhibit lease was designed to help, rather than hinder. When Boland sent a surveyor to the Keck land, Keck's son assisted in the survey and pointed out the property lines. (R. 204 and 209.) There was no interference by Keck. (R. 209-210.) When Boland said he would have difficulty reaching the location staked, Keck hopped out on his crutches and showed Muth and Boland a better way to get in. (R. 391.)

In short, Keck did everything to help Plaintiff, and nothing to hinder him to the very last hour of the last day.

After the lease of December 22, 1947, expired, through no fault of Keck, he was free to deal with whomever he chose and to demand such assurances as he required before executing a new lease. That he did demand such an assurance is not surprising in view of the fact that Boland bragged that lawsuits were his hobby. (R. 394.) The salient fact is that the alleged verbal indemnity of March 23, 1948 and the indemnity letter of March 27, 1948 were *after* the expiration of the joint lease.

Petitioner places his chief reliance upon the fact that Keck placed the exhibit lease, or so-called "top" lease, in Oeth's hands, that the "top" lease was the thing which actually prevented performance, and that Keck thereby becomes responsible. Of course, Muth was actually "prevented" only by his own inability and the terms of his own contract; but even in the matter of the exhibit lease, Keck demonstrated his complete good faith toward Muth, for he advised Muth of it and of its purpose some two weeks ("about March 10, 1948", Finding 13, R. 465) before the expiration of the joint lease, and explained that it did not impinge on the validity of the then-existing joint lease. (R. 465.)

Even as to the exhibit lease, Plaintiff-Petitioner places a construction on the testimony contrary to the preponderance of the evidence, and differing from that found by the Special Master and approved by the District Court and by the Court of Appeals. Certiorari is not granted for the purpose of reviewing the evidence and discussing specific facts (*U. S.* v. *Johnston* (1925), 268 U. S. S. 220; 45 S. Ct. 496; 69 L. Ed. 925) for findings of fact by the trial court, even on disputed evidence, which are not questioned by the Court of Appeals and which have any substantial support in the evidence will be accepted in this Court as unassailable. *Alabama Power Co.* v. *Ickes* (1937), 302 U. S. 464; 58 S. Ct. 300; 82 L. Ed. 374. To the same effect are *Coreyell* v. *Phipps* (1942), 317 U. S. 406; 63 S. Ct. 291; *Comstock* v. *International Investors* (1948), 335 U. S. 211; 68 S. Ct. 1454; 92 L. Ed. 1911; *Davis* v. *Schwartz* (1894), 155 U. S. 631; 15 S. Ct. 237; 39 L. Ed. 289; *Adamson* v. *Gilliland* (1917), 242 U. S. 350; 37 S. Ct. 169; 61 L. Ed. 356.

The principal cases cited by Petitioner in his new petition which were not cited in his first one are *United States* v. *Dunn*, 268 U. S. 121; 69 L. Ed. 876, and *McMullen* v. *Hoffman*, 174 U. S., 43 L. Ed. 1117. In the *Dunn* case, a lessee and a guardian secretly conspired to obtain for themselves an oil and gas lease on the lands of the guardian's ward. In the *McMullen* case the parties conspired to submit fraudulent bids, and to share equally in the fruits. Of course, this Court refused to extend its protection to those claiming under such fraudulent agreements. But they bear no relation to the case at bar. There was no agreement of any kind among the defendants *before* Plaintiff's lease expired. The indemnity agreement of which Plaintiff now complains was entered into *after* the expiration of the lease of March 22, 1947. These new authorities are not applicable. The others have al-

ready been discussed in our Answer to the first Petition for Certiorari.

We think the Special Master, the District Court, and the Court of Appeals were right, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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